

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3231

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE CONDEMNATION APPEALS OF WAL-MART STORES,
INC., A DELAWARE CORPORATION, AND 1447, INC., A
FLORIDA CORPORATION:**

WISCONSIN DEPARTMENT OF TRANSPORTATION,

APPELLANT,

v.

WAL-MART STORES, INC., AND 1447, INC.,

RESPONDENTS.

APPEAL from a judgment of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. The primary issue on appeal is whether, in a condemnation proceeding, attorney and appraisal fees incurred prior to the jurisdictional offer are recoverable as litigation expenses. We conclude they are

not, and therefore we reverse that part of the judgment awarding these expenses and remand the matter for further proceedings.

The facts are undisputed. This is an eminent domain case where the State determined it needed to acquire a small portion of land from Wal-Mart Stores, Inc., and 1447, Inc. (respondents) to widen an avenue, including the construction of a frontage road. Wal-Mart had a long-term lease from 1447 which owned the property. After negotiations failed to achieve an agreed price, the State served the respondents with a jurisdictional offer of \$111,440.

The respondents appealed the jurisdictional offer to the condemnation commission pursuant to § 32.05(4), STATS. The commission awarded \$330,000 and neither party appealed this award. The respondents then filed an action in circuit court to recover its litigation expenses, including attorney and appraisal fees incurred prior to the jurisdictional offer. Over the State's objection, the court awarded the respondents their entire request for litigation expenses. On appeal, the State disputes only that portion of the judgment awarding attorney and appraisal fees incurred prior to the jurisdictional offer.

Section 32.28(1), STATS., specifically defines litigation expenses as follows:

In this section, "litigation expenses" means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter. (Emphasis supplied.)

Essentially, the circuit court agreed with the respondents' contentions that under § 32.28, STATS., these expenses begin when a landowner feels that his property is the target of acquisition by the party seeking to exercise the right of eminent domain and, therefore, were necessary "to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners." The circuit court accordingly held the State responsible for the respondents' attorney and appraisal expenses incurred before and after the date of the jurisdictional offer.

ATTORNEY FEES

In *Kluenker v. DOT*, 109 Wis.2d 602, 606, 327 N.W.2d 145, 148 (Ct. App. 1982), after reviewing the same issue, we concluded that the plain meaning of § 32.28, STATS., prohibits recovery for attorney fees incurred prior to the date of the jurisdictional offer:

The Kluenkers argue that this section permits recovery of attorney's fees from the date the state made its original offer. We disagree, for prior to the date of making the jurisdictional offer, there were no "actual" proceedings before the commission or court. Nor could proceedings have been "anticipated" prior to that date.

Since there is no official complete action in a condemnation case until the jurisdictional offer, it follows that a condemnee cannot be certain of a condemnor's position until that juncture. Only then does the expectation of appeal to a commission accrue, not when the preliminary negotiations are set in motion which may or may not ultimately prove unsatisfactory.

The trial court's construction of sec. 32.28, STATS., if carried to its logical conclusion, could lead to a result inconsistent with the express language of the statute. The court stated in its decision that it was "not require[d] ... to arbitrarily pick or point between the beginning and the end of the continuing events involved in this litigation and

measure the result of counsel's services from that point... Counsel is entitled to recover for their services from the beginning to the conclusion." Were the trial court's reasoning accepted, it would necessarily follow that condemnees are entitled to attorney's fees in any case where no appeal is taken from the basic award. This is a result clearly inconsistent with the statutory language. None of the subsections of sec. 32.28(3), STATS., provide for the recovery of attorney's fees when there has not been any proceeding before the commission or a court. We cannot assume the legislature intended attorney's fees be recoverable in circumstances other than those expressly mentioned. See *Teamsters Union Local 695 v. County of Waukesha*, 57 Wis.2d 62, 66-67, 203 N.W.2d 707, 709-10 (1973). This would be an unreasonable construction, and we must construe statutes to avoid unreasonable or absurd results. *Keithley v. Keithley*, 95 Wis.2d 136, 138, 289 N.W.2d 368, 370 (Ct. App. 1980).

Because the plain meaning of the statute is that attorney's fees incurred prior to the date of the jurisdictional award are not "litigation expenses" within sec. 32.28, STATS., and because the trial court's construction could lead to results inconsistent with the express language of the statute, it was improper to award attorney's fees for the period prior to the date of the jurisdictional award.

The respondents attempt to distinguish *Kluenker* on the basis that the jurisdictional offer in *Kluenker* was made two years after the initial negotiations took place. Here, they argue that because the jurisdictional offer occurred within five months after the negotiations, clearly the attorney fees were incurred in anticipation of the proceedings before the commission. Although there is some merit to their argument that these expenses may have been incurred in anticipation of proceedings before the commission, the holding in *Kluenker* is very specific. Expenses incurred prior to the jurisdictional offer are not litigation expenses incurred in anticipation of proceedings before the commission. We are obligated to follow the dictates in *Kluenker*. See *Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Therefore, the respondents are not entitled

to recover their attorney fees as litigation expenses if they were incurred prior to the jurisdictional offer.

APPRAISAL FEES

The respondents contend that in any event, appraisal fees are recoverable even if incurred prior to the jurisdictional offer. They argue that § 32.05(2)(b), STATS., provides for a condemnee to recover its appraisal costs regardless whether the matter is ever appealed to the condemnation commission or the circuit court. This statement is overly broad.

Specifically, § 32.05(2)(b), STATS., dealing with negotiations prior to a jurisdictional offer, provides in part:

The owner may obtain an appraisal by a qualified appraiser of all property proposed to be acquired, and may submit the reasonable costs of the appraisal to the condemnor for payment. The owner shall submit a full narrative appraisal to the condemnor within 60 days after the owner receives the condemnor's appraisal.

When adopting this statute, the legislature noted:

The Act also allows the condemnee to submit the reasonable costs of an appraisal made by a qualified person of his or her choosing to the condemning authority for payment by the latter. The landowner's appraisal must be made within 60 days after the owner receives the condemnor's appraisal, and a full narrative must be furnished to the condemnor.

Legislative Council Notes, 1977, WIS. STAT. ANN. § 32.05 (West 1989).

Therefore, to recover appraisal fees incurred prior to the jurisdictional offer, they must be made in response to and submitted for payment

with a full narrative within sixty days of the condemnor's appraisal. Otherwise, appraisal fees are recoverable only under § 32.28(1), STATS., which defines litigation expenses to include both attorney fees and appraisal fees.

The record shows that the disputed appraisal fees were not in response to a condemnor's appraisal and not submitted for payment with a full narrative as required under § 32.05, STATS. Also, the record shows that the respondents did not attempt to recover these disputed appraisal costs under § 32.05, but rather convinced the trial court that these appraisal expenses were incurred under § 32.28, STATS., as litigation expenses in anticipation of the proceedings before the commission.

There is no difference between attorney and appraisal fees insofar as their coverage under § 32.28, STATS., is concerned. If attorney fees incurred prior to the date of the jurisdictional offer are not litigation expenses within § 32.28, it necessarily follows that appraisal fees incurred prior to the date of the jurisdictional offer are not litigation expenses within § 32.28. Consequently, under the reasoning of *Kluenker*, the respondents are not entitled to recover appraisal fees incurred prior to the jurisdictional offer as a litigation expense under § 32.28.

Because the circuit court included as litigation expenses attorney and appraisal fees incurred prior to the date of the jurisdictional offer, we reverse that part of the judgment and remand the matter to the circuit court. On remand, the court is to determine and award only those reasonable litigation expenses that were necessary for the condemnation hearing after the date of the jurisdictional offer. Also, because the respondents did not prevail on the appeal, they are not entitled to

recover their appellate costs as litigation expenses. *See Joyce v. School Dist. of Hudson*, 169 Wis.2d 611, 618, 487 N.W.2d 41, 44 (Ct. App. 1992).

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

